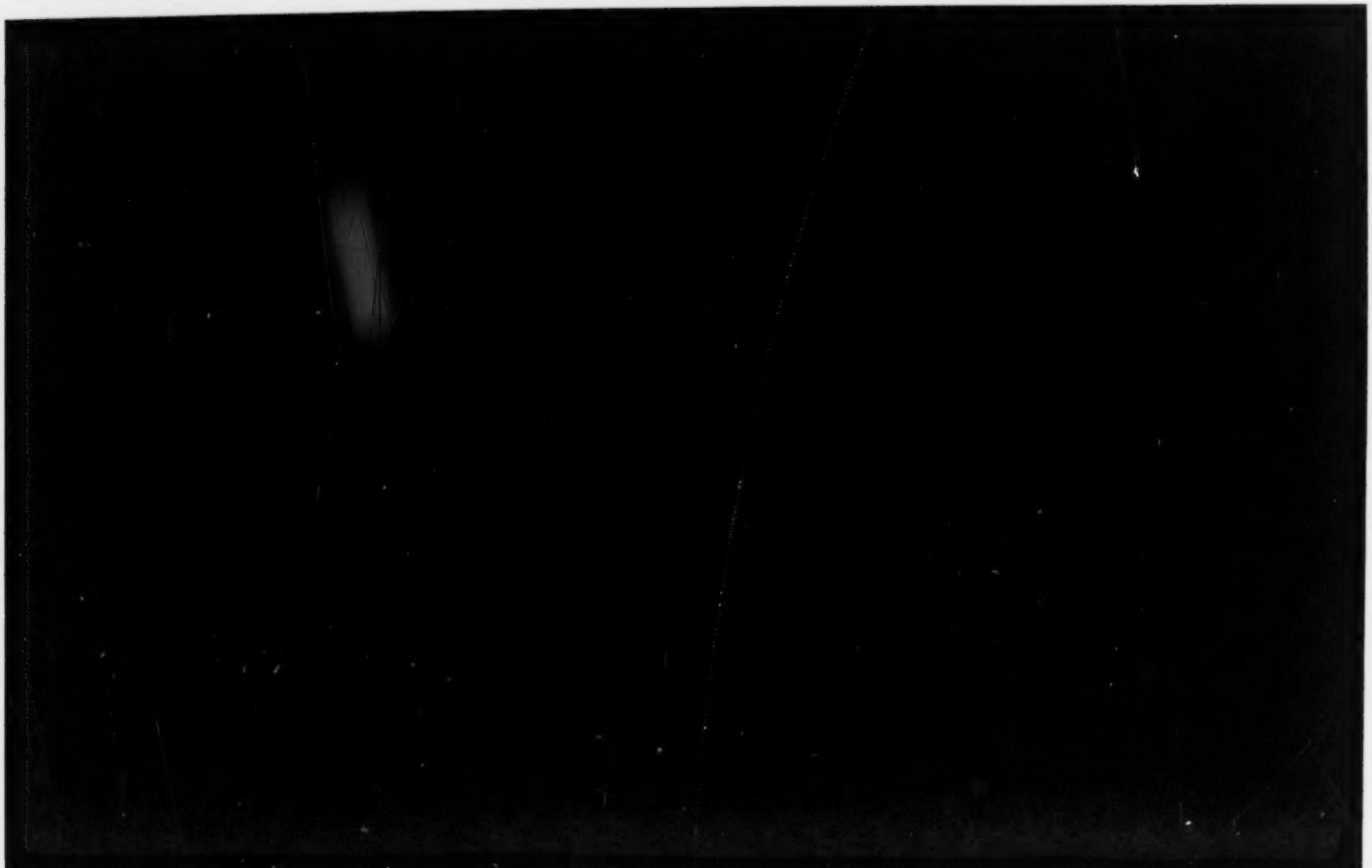

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315797—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 924

TOM WING ART, ALIAS WING FOOK TOM, ALIAS SHORTY YUEN, PETITIONER

v.

WILLIAM A. CARMICHAEL, DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DISTRICT NO. 20

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court of the United States for the Southern District of California. The opinion of the Circuit Court of Appeals (R. 40–42) is reported in 117 F. (2d) 158.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 42). A peti-

tion for rehearing was denied February 7, 1941 (R. 43). The petition for writ of certiorari was filed April 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether the record before the immigration authorities in the deportation proceeding contains evidence to show that petitioner either (a) was connected with the management of a house of prostitution, (b) received, shared in, or derived benefit from the earnings of a prostitute, or (c) managed a house of prostitution.

2. Whether under Section 19 of the Immigration Act of 1917 it was necessary to establish that the petitioner's misconduct was occurring at the time the warrant of arrest was issued.

STATUTE INVOLVED

U. S. C., Title 8, Sec. 155 (Sec. 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889), provides in part as follows:

> * * * *any alien who shall be found* an inmate of or *connected with the management of a house of prostitution* or practicing prostitution after such alien shall have entered the United States, *or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages* or is employed by, in,

or in connection with *any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather,* or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section 138 of this title;[1] * * * shall, upon the warrant of the

[1] U. S. C., Title 8, Sec. 138 (Sec. 4 of the Immigration Act of February 5, 1917, 39 Stat. 878), provides:

"The importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose, is forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, shall in every such case be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment for a term of not more than ten years and by a fine of not more than $5,000. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said impor-

Secretary of Labor, be taken into custody and deported. * * * [Italics ours.][2]

STATEMENT

The petitioner, a citizen of China, entered the United States on June 12, 1921, as the son of a Chinese government official[2a] and has resided in San Diego, California, continuously since 1922 (Immigration Record, hereinafter called I. R., 30–31, 34–35).

On August 16, 1938, petitioner was arrested under a warrant issued by an Assistant Secretary of Labor charging, *inter alia,* connection with the management of a house of prostitution, the management of such a house, and the receiving, sharing in, or deriving benefit from the earnings of a prostitute (I. R. 296).

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tation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occurs. Any alien who shall, after he has been excluded and deported in pursuance of the provisions of this subchapter which relate to prostitutes, procurers, or other like immoral persons, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment for a term of not more than two years. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against each other." (Feb. 5, 1917, c. 29, Sec. 4, 39 Stat. 878.)

[2] The deportation order was based upon the italicized provisions of the statute.

[2a] Petitioner's father, at the time of petitioner's entry, was connected with one of the Six Chinese Companies, benevolent associations then considered semi-governmental. Section 3 of the Immigration Act of 1917, 39 Stat. 878

Various hearings were held by an immigrant inspector, petitioner being represented by counsel at those hearings at which evidence was introduced (I. R. 27–268). The Government introduced the testimony of two witnesses with reference to petitioner's participation in the business conducted at two houses of prostitution in San Diego, the De Luxe rooms, during the period from shortly prior to June 1932 to January 1934, and the Ardmore rooms, during the last few months of 1933 and from July through September 1936 (I. R. 38–97, 304–326). Both were cross-examined exhaustively by counsel for petitioner but did not modify their testimony in any significant detail (I. R. 38–97). To contradict the Government's witnesses, petitioner himself took the stand and called two witnesses, who testified in effect that they conducted the two rooming houses in question and that petitioner had nothing to do with them (I. R. 98–180, 197–210, 265–268). The Government called four witnesses in rebuttal (I. R. 211–265).

(U. S. C., Title 8, Sec. 136 (r)), provides: "That nothing in this Act shall be construed to apply to accredited officials of foreign Governments, nor to their suites, families, or guests." However, in an investigation conducted by the Immigration and Naturalization Service of this Department into the father's present status, the father admitted that his connection with the Six Companies terminated prior to February 5, 1924, and that he has had no official position since that time. The misconduct involved in the present case occurred after February 5, 1924. Neither here nor below has the petitioner claimed any immunity under Section 3.

The testimony of these various witnesses is summarized at length in the reports of the immigrant inspector and the Board of Review [3] (I. R. 269–278, 3–10).

These authorities found that three of the four charges made against the petitioner were supported by evidence and recommended petitioner's deportation (I. R. 278–279, 9–10).[4] After consideration of the proofs an Assistant to the Secretary of Labor, on August 14, 1939, issued a warrant of deportation (R. 13–14) reciting that petitioner "(1) has been found connected with the management of a house of prostitution; (2) has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; (3) has been found managing a house of prostitution, or music or dance hall, or other place of amusement or resort, habitually frequented by prostitutes or where prostitutes gather."

On October 2, 1939, the petitioner filed in the District Court for the Southern District of Cali-

[3] Before the Board of Review petitioner was represented by counsel, who appeared in person and presented a brief (I. R. 3, 12–25).

[4] In its report the Board of Review stated that (I. R. 3): "There is some indication that the connection of this alien with the business of prostitution in these two places [the De Luxe and the Ardmore rooms] may have been as the agent of one Tom Quin, who is alleged to have been the employer of this alien, and the Board of Review agrees with the stated opinion of the examining inspector that 'it is unnecessary to distinguish' whether the alien's connection with the business of prostitution in those places was that of a proprietor or that of an agent of a proprietor."

fornia a petition for a writ of habeas corpus (R. 1–8) which, so far as is presently pertinent, alleged that the Secretary of Labor had acted in excess of authority in that there was absolutely no evidence that the petitioner at the time of his arrest was engaged in the misconduct recited in the deportation warrant (R. 4–5), and that he had been denied a "fair hearing" because the Secretary had not been guided by the evidence and the provisions of the immigration laws (R. 5).[5] Petitioner requested that the immigration record be presented to the court at its hearing and when so presented it be regarded as incorporated in the petition as an exhibit (R. 7).

On the same day the District Court issued an order to show cause why the writ should not be granted (R. 9–10) and also the writ itself (R. 10–11). A return to the writ was filed on August 13, 1939, with a copy of the deportation warrant of August 14, 1939, annexed as an exhibit. The proceeding came on for hearing and was submitted on briefs, and the District Court, without opinion, denied the petition (R. 16).[6] The District Court's order was unanimously affirmed by the Circuit Court of Appeals (R. 40–42).

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[5] Possibly this was broad enough to support the point urged on appeal that the record contained no evidence tending to establish any of the grounds upon which deportation was predicated. See "Statement of points on which appellant intends to rely" (R. 25, 32).

[6] While no findings of fact were entered by the court (*White* v. *Johnston*, No. 697, present Term), this was not

ARGUMENT

1. Petitioner seeks to have this Court review the evidence *de novo* to determine whether he is deportable under Section 19 of the Immigration Act. This position clearly misconceives the scope of judicial review in deportation proceedings for it is axiomatic that the findings of the Secretary, if supported by evidence, are "conclusive upon the courts." *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Kessler* v. *Strecker,* 307 U. S. 22, 34.

If, as we submit, the provisions of Section 19 upon which the warrant of deportation was predicated cover misconduct occurring prior to the commencement of the deportation proceeding as well as misconduct occurring at that time, there can be no doubt that, as the Circuit Court of Appeals said (R. 41): "The record reeks with * * * evidence" that petitioner managed or was connected with the management of a house of prostitution or received, shared in, or derived benefit from the earnings of a prostitute. Thus, it was shown that petitioner called at the De Luxe

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error in the instant case. The petitioner's contentions involve either the construction of the statute or the sufficiency of the evidence before the Secretary. They are determinable upon the immigration record which was made a part of the petition for writ of habeas corpus. Obviously, evidence was not required to resolve these contentions. Indeed, the court could not have attempted to supplement the evidence before the Secretary by a trial *de novo* (*Kessler* v. *Strecker,* 307 U. S. 22, 34). Issuance of the writ was consequently not required in the instant case.

rooms every night and at regular intervals "checked up" the receipts with the "landlady," a portion of which he retained (I. R. 309, 54), employed a prostitute to manage the place for him, dividing the net proceeds with her from time to time (I. R. 311–312), and stated to the police at one time that he was the owner (I. R. 213). Petitioner possessed a key to the Ardmore rooms (I. R. 321, 87), and on one occasion, at least, took his share of the money from a desk where the prostitutes deposited the fees (I. R. 322–323). On another occasion, he reprimanded a prostitute for sleeping while on call (I. R. 321), boasted that he was the "boss," and otherwise demeaned himself as one vested with authority superior to that of the landlady (I. R. 323–325). His collections from the Ardmore rooms were either on his own behalf or for one Quin, who operated several houses of prostitution (I. R. 322, 323).

Hence, petitioner's contention that this testimony fails to show his connection with the business of prostitution is wholly without merit. See *In re Psimoules,* 222 Fed. 118, 120–121 (S. D. Cal.), appeal dismissed, 224 Fed. 1022; *Costanzo* v. *Tillinghast,* 287 U. S. 341; *Chiuye Inouye* v. *Carr,* 98 F. (2d) 46 (C. C. A. 9th); *Yee Look* v. *Burnet,* 65 F. (2d) 594 (C. C. A. 9th); *Ex parte Loo Sheung,* 210 Fed. 990 (D. C. Cal.).

Petitioner testified on his own behalf and produced two witnesses connected with the two houses

of prostitution in question. Their testimony was to the effect that petitioner simply did errands for Quin, did not know of Quin's prostitution business, had no connection with that business, and derived no benefit from it (I. R. 98–180, 197–210, 265–268). This testimony produced at the most a conflict in the evidence which the immigration authorities were entitled to resolve. *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358; *Tisi* v. *Tod,* 264 U. S. 131, 133; *Chin Yow* v. *United States,* 206 U. S. 8, 13; *Lee Lung* v. *Patterson,* 186 U. S. 165.

Petitioner also states (Pet. 28) that the findings "are supported by testimony of common rumors, general repute, and hearsay statements made by unidentified persons," but does not specify the evidence to which he refers. As we have shown, there was abundant evidence by witnesses personally acquainted with the facts.[7]

There is also no basis for petitioner's contention that the Circuit Court of Appeals held, contrary to *Werrman* v. *Perkins,* 79 F. (2d) 467 (C. C. A. 7th), that the burden was upon him to prove his right to remain in this country, even though he had lawfully entered the United States.[8]

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[7] If there is competent evidence to support a warrant of deportation, the presence of wholly insubstantial or incompetent evidence in the immigration record does not serve to make the decision arbitrary or capricious. *Chin Shee* v. *White,* 273 Fed. 801, 804 (C. C. A. 9th); *Guiney* v. *Bonham,* 261 Fed. 582, 585 (C. C. A. 9th).

[8] There is nothing in the opinion of the Circuit Court of Appeals which sanctions any such contention, nor is there

2. The petitioner, without analysis of the statute and in reliance solely upon the decision in *Kessler* v. *Strecker*, 307 U. S. 22, contends that the provisions of Section 19 of the Immigration Act of 1917 upon which the deportation order was based do not permit of his deportation because they relate only to misconduct occurring at the time the warrant of arrest is issued and not past misconduct. In this connection he points out that there was an interval of more than two years between the last misconduct upon which the Government relies and the issuance of the warrant of arrest.[9]

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anything in the immigration record which indicates that either the immigrant inspector or the Board of Review considered that the burden of proof was upon the petitioner. Indeed, it is apparent from the reports of the immigration authorities that their recommendations to deport were based on the ground that the Government had established all but one of its charges (I. R. 278–279, 9–10).

[9] It might well have been argued that in view of the fact that petitioner's misconduct had persisted for over four years the immigration authorities might reasonably have drawn the inference that this misconduct was being continued at the time the deportation proceeding commenced. However, there is nothing in the reports of the immigration authorities which expressly discloses that they drew this inference and there is some basis in the report of the Board of Review for the view that it may have been thought that past misconduct was sufficient (see paragraph dealing with the *Strecker* decision at I. R. 9). If the statutory provisions were limited in their application to misconduct occurring at the time the warrant of arrest is issued, the case should probably, under the circumstances, be remanded to the immigration authorities for further consideration. However, we think it is clear that those provisions are not so limited.

The *Strecker* decision is, we submit, not controlling. That case involved the construction of Section 2 of the Act of October 16, 1918,[10] not the provisions of Section 19 of the 1917 Act here involved (*supra,* pp. 2–3).

In holding that under Section 2 of the 1918 Act an alien who had become a member of a proscribed organization after entry could not be deported where he had ceased to be such at the time of his arrest, the Court placed considerable emphasis upon many factors which are absent here. These include: the fact that the section referred back for definition of the deportable classes to the provisions of Section 1, permitting exclusion only for present membership in a proscribed organization; the fact that the natural meaning of the deportation section indicated that the verb "found" properly qualified the phrase "at any time"; the fact that naturalization was denied only for existing membership in an interdicted organization; the support found in the legislative history; and the lack of a uniform administrative interpretation.

The so-called prostitution provisions of Section 19 of the 1917 Act are not comparable. While it is true that the exclusion provisions

[10] Section 2 of the 1918 Act (c. 186, 40 Stat. 1012) provided that "any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any of the

dealing with prostitutes, procurers, and pimps relate only to a then existing rather than a past status or condition,[11] there is no reference back in the deportation provisions to the exclusion provisions in order to ascertain the deportable classes. They are enumerated and defined anew and with greater coverage. Moreover, those provisions, when read in their entirety (*supra,* pp. 2–3) make it abundantly clear that Congress meant that the country should be rid not only of those who were at the time of arrest engaged in the denounced practices but had manifested that they were members of a depraved and degraded class by their past misconduct, even if it consisted

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classes of aliens enumerated" in Section 1 shall, upon warrant of the Secretary of Labor, be taken into custody and deported. Section 1, as amended in 1920, provided for the exclusion of certain classes of alien immigrants, among which was "aliens who believe in, advise, advocate, or teach, or who are members of, or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government of the United States * * *."

[11] U. S. C., Title 8, Section 136 (Section 3 of the 1917 Act), provides that "the following classes of aliens shall be excluded from admission to the United States: * * * (g) * * * prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who directly or indirectly procure or attempt to procure or import prostitutes or persons for the purpose of prostitution, or for any other immoral purpose; persons who are supported by or receiving in whole or in part the proceeds of prostitution."

of a solitary act, such as, for example, the importing of a single prostitute or protecting her from arrest. Certainly as to such acts the statute would be well-nigh emasculated if it were required that the immigration authorities catch the alien red-handed and begin the proceeding while the act is being continued. The fact also that no time limitation is imposed upon deportation under the prostitution provisions of Section 19 (*Costanzo* v. *Tillinghast,* 287 U. S. 341) is strong evidence, when considered in connection with acts of the type mentioned, that Congress intended that the past as well as the present conduct of the alien should, so long as he remains an alien, be the subject of scrutiny.[12]

Furthermore, the verb "found" appears only in the clause of the prostitution provisions dealing with inmates of houses of prostitution, those practicing prostitution, and those connected with the management of a house of prostitution. It is not associated with any language, as in the

[12] The only exception is that of the prostitute, the procurer, or the pimp who was such at the time of entry but who was not discovered to be within that category within five years after entry. As to these a five-year limitation upon deportation is provided by the first clause of Section 19. However, it is unlikely that many of these are not taken into custody within the five-year period or that they do not commit similar acts after entry bringing them within the scope of the deportation provisions as to which no time limit applies.

Strecker case, which requires that it be confined to present activity. If it were given any such connotation, the unusual and apparently uncontemplated result would follow that an alien connected with the management of a house of prostitution or practicing prostitution would be deportable only if he or she was so engaged at the time the deportation proceeding began but that an alien who managed a house of prostitution or was employed by, in, or in connection with a house of prostitution, or received, shared in, or derived benefit from the earnings of a prostitute could be deported if this activity occurred in the past. The verb "found" is evidently used only in its ordinary meaning of "ascertained" (*In the Matter of Umeno,* 3 U. S. Dist. Ct. Haw. 481, 485), i. e., the Secretary must determine after an investigation that the facts are such as to bring the alien within the statutory prohibition.

We have been unable to find any legislative history or articulated administrative interpretation which would, as in the *Strecker* case, make against the Government's position.[13]

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[13] Petitioner also contends that the three-year statute of limitations applicable in criminal cases barred the deportation proceedings (Pet. 17, 20, 26–27). Deportation proceedings are, of course, civil and not criminal in nature (*Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Tisi* v. *Tod*, 264 U. S. 131, 133). And it is, moreover, well settled that no time limitation upon deportation exists as to the grounds upon which the deportation warrant in the present case is based. *Costanzo* v. *Tillinghast*, *supra*.

CONCLUSION

There exists no conflict of decisions, and the *Strecker* case is not controlling. The evidence abundantly sustained the deportation warrant under a correct construction of the statute. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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